HAWAIIAN ANNEXATION.

The Joint Resolution—An unconstitutional usurpation of the prerogative of the President of the United States and Senate as the treaty-making power.

SPEECH

OF

HON. A. O. BACON,

OF GEORGIA,

IN THE

SENATE OF THE UNITED STATES,

Monday, June 20, 1898.

WASHINGTON.
1898.

SPEECH

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HON. A. O. BACON.

The Senate having under consideration the joint resolution (H. Res. 259) to provide for annexing the Hawaiian Islands to the United States—

Mr. BACON said:

Mr. PRESIDENT: I presume it will be recognized by all that there can be no more important question than this before the country to-day. It is not simply the question of the annexation of a very small piece of territory, but, considered with reference to the merits of the case, it is one which involves the utter revolution of the practice and traditions of our Government with reference to its benefits to the people and the obligations which it lays upon them.

It is not my purpose at this time to discuss the general merits of this proposition. I am inclined to address the Senate at this time because the particular branch of the discussion to which I shall direct my attention is one which goes to the root of the matter and which ought, if my contention is correct, to control the action of the Senate.

Before proceeding with it, I think, however, I may be excused for remarking that certainly this is a strange presentation to the country, that in a matter of such gravity, that in a matter of such wide-reaching importance, the advocates of the measure have nothing to say. Ordinarily in measures of importance which come from the Foreign Relations Committee we have a report. In this instance the committee have not even honored us with a report. Ordinarily not only do we have a report, but we have from the chairman of that committee or some member representing the committee an elaborate presentation of the reasons why the legislation is recommended by that committee. But here we have neither report nor presentation. We have simply presented to the Senate a bill which has been passed by the House, and without report and without discussion those who hold to the affirmative ask the Senate to act. It is as if, confident of a majority, they should say, "We propose to do thus and so, right or wrong, and give no reason for it; and what are you going to do about it?" That is the attitude which the committee occupy in coming before the Senate.

Mr. President, as I stated, it is not my purpose to discuss the general merits of the proposition to annex the islands of Hawaii, certainly not at this time; but I propose to present to the Senate a proposition and to ask that they may give me their attention while I discuss it, which, if it be true, as I have previously said, ought to control the action of the Senate and make them say that they will not pass the bill which the House has sent to us.

The proposition which I propose to discuss is that a measure which provides for the annexation of foreign territory is necessarily, essentially, the subject-matter of a treaty, and that the assumption of the House of Representatives in the passage of the bill, and the proposition on the part of the Foreign Relations Committee that the Senate shall pass the bill, is utterly without warrant in the Constitution.

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Mr. President, the Senator from Colorado [Mr. TELLER] says that he would be very glad to vote on this question to-day; that his mind is made up. The Senator from Colorado is one of the Senators whom I am anxious to speak to to-day, not because I believe I can change his mind or his opinion on the general merits of this question, but because I desire to ask him and all Senators, especially those who are lawyers, to consider the question whether or not they have the right, under their constitutional obligations, to vote for this resolution, however much they may favor the annexation of Hawaii.

Mr. TELLER. Will the Senator permit me to answer that now?

Mr. BACON. I beg that the Senator will hear me before he answers.

Mr. TELLER. I want to say that I will hear the Senator, but the Senator is not to understand that I have not myself considered this question very carefully. I will hear the Senator, of course.

Mr. BACON. Mr. President, of course I do not presume that the Senator from Colorado had not considered this question, but we are here for the purpose of interchanging views. I have great confidence in the Senator from Colorado, and am gratified by the fact that I seldom differ from him, and I shall be more than gratified if we can get together upon this question.

I assume that Senators will not vote for a resolution if they can be satisfied that it is unconstitutional. I assume that they will not vote for an unconstitutional resolution which directly impairs and strikes down one of the highest prerogatives of the Senate; and it is to that question that I propose to address myself to-day and upon which I am extremely anxious to have the hearing of Senators who favor the annexation of Hawaii.

The proposition which I had stated before the interruption was this: That a joint resolution for the annexation of foreign territory was necessarily and essentially the subject-matter of a treaty, and that it could not be accomplished legally and constitutionally by a statute or joint resolution. If Hawaii is to be annexed, it ought certainly to be annexed by a constitutional method; and if by a constitutional method it can not be annexed, no Senator ought to desire its annexation sufficiently to induce him to give his support to an unconstitutional measure.

I trust, Mr. President, that the time has not come when a Senator can not appeal with confidence to his fellow-Senators in opposition to a measure on the ground that it is unconstitutional. It matters not how important it may be that Hawaii should be annexed, it matters not how valuable it may be, it will be too costly if its price is the violation of a great fundamental provision of the Constitution of the United States.

Mr. President, it is a painful fact that not only people at large, but officials are losing to some extent the reverence which they ought to have for constitutional obligations. It is a matter of a

smile with some when you oppose a measure on the ground that it is unconstitutional, and I confess that I have been pained when I have heard, as I have heard in this Chamber, learned and distinguished Senators say that they would approve and applaud the action of the President of the United States if he would seize Hawaii and run up upon it the flag of the United States, and take possession of it as the property of the United States as a war measure.

I say I have been pained when I have heard that, as I have heard it in this Chamber from very learned and very distinguished Senators, and I have been more than gratified that the President of the United States has not suffered himself to be guided by such foolish and such unwise counsels. If he had done so, every lover of his country must have been grieved that such a blow had been stricken at the integrity of the Constitution.

Mr. President, it surprises me that I even have to mention such a proposition; but if the President of the United States can in time of war, or at any other time, without the action of Congress in the performance of its constitutional functions, take possession of the territory of a friendly power, proclaim it as the territory of the United States, run the flag of the United States up over it as the insignia of its power and its dominion—if he can do so in one case, he can do so in any.

If the President of the United States can do it in the case of Hawaii, he can with equal propriety and legality do it in the case of Jamaica, and I repeat that I am more than gratified, although my apprehensions were aroused by the source from which those intimations came, that the President of the United States has not seen proper to listen to their unwise counsels.

And yet, Mr. President, if my view of this question is correct, the President of the United States would have as much power to take possession of the Island of Hawaii by a proclamation as would the Congress of the United States have the power to gain possession of it by a joint resolution of the two Houses. The powers of the executive department and the legislative department are as distinctly divided the one from the other as are the powers of the judicial department and the legislative department.

There are two kinds of law which are recognized by the Constitution of the United States and which are provided for by the Constitution of the United States, and each of these kinds of law is termed in the Constitution of the United States the supreme law of the land. One class of these laws is statute law, and it is provided that statute law shall be enacted by Congress; that statute law shall be made by a majority vote of the House of Representatives and of the Senate, with the approval of the President, or that it may be made, in case of the disapproval of the President, by the two-thirds vote of the House of Representatives and the two-thirds vote of the Senate, overriding his veto, and that law, when made, is declared by the Constitution of the United States to be the supreme law of the land. In the same way the Constitution of the United States declares that there are other laws which are also supreme, and those laws are made as treaties. The Constitution of the United States in the same section declares both of these as the supreme law of the land.

The Supreme Court of the United States in construing the question of supremacy has ruled that each is supreme. It has ruled that a treaty may be nullified by a statute and that a statute may

be nullified by a treaty, and that where they come in conflict the question of the later is the one invoked to determine which shall prevail. As to those two classes of law, each one of them supreme, there is provided in the Constitution an entirely distinct method by which they may be enacted or made. I have stated the manner in which the statute law is made. Now, in an entirely different manner, the Constitution of the United States declares how a treaty, which is also a supreme law, shall be made. It declares that a treaty must be made by the President of the United States, by and with the advice and consent of two-thirds of the Senate present. I am not quoting literally, but stating it substantially.

I ask the attention of Senators to this most marked provision in the Constitution of the United States and the two distinct classes of law, each of them declared by the Constitution to be supreme, each of them declared by the Supreme Court of the United States in construing that provision to be equally supreme with the other, which are made and enacted in specific ways in the manner pointed out in the Constitution, one totally different from the other. Is that provision of the Constitution a vital principle? Does it mean anything? Is it possible that the power which is clothed by the Constitution with the authority to make one class of laws can make the other class of laws?

Is it possible that the power which is conferred upon the Congress of the United States, the lawmaking power, the Senate and the House, with the approval of the President, can be used to make that other supreme law which the Constitution says shall be made in a different way, to wit, by the President, with the advice and consent of the Senate? If it is possible for the House of Representatives and the Senate and the President, acting in the lawmaking capacity, and known generally in the Constitution as Congress, can make a treaty, and in so making it make it the supreme law of the land, then this joint resolution is constitutional. But if it be true that when the Constitution devolved upon the President and the Senate the power to make treaties it denied to the Congress of the United States the right to make treaties, then the joint resolution is necessarily unconstitutional, as I shall endeavor to show.

Mr. President, the Constitution gives to the President the power to appoint all officers of the United States by and with the advice and consent of the Senate. If Congress can by statute make a treaty, why may it not by a statute make an ambassador or a chief justice or a general of the Army?

Mr. President, there are two ways in which the provision in the Constitution conferring upon the President of the United States and the Senate the power to make treaties can be absolutely nullified. One is the manner I have suggested, by Congress openly and boldly assuming to make a treaty; and if constitutional restrictions are not to be respected, if no man is bound by the Constitution, if a Senator or a Representative, because forsooth he may be in the majority can effect his purpose by overriding the Constitution and disregarding it, then that is the simplest way to do it. There is still another way in which this provision in the Constitution can be nullified, and that is by undertaking to put into the form of a statute that which in reality is a treaty. Now, one method is just as effective as the other, and either method is as absolutely illegal as the other.

Before going further in that line of argument, in order that I may have the attention of Senators and that they may not think there is an answer which I do not recognize, I desire to say that I of course fully understand the argument which is made in reply that the State of Texas was admitted in this way. I can not stop to interrupt the thread of the argument at the present point to show that that reply is not a good one. Not to elaborate it further, I will merely state that it is the distinction between the authority of Congress to admit a State, to do which it is given the power in words in the Constitution, and the power to acquire foreign territory not for the purpose of making it a State, which, as I shall endeavor to show, is essentially and necessarily the subject-matter of treaty between two governments.

Mr. President, when the framers of the Constitution put the word "treaties" into the Constitution without any other defining words or without any limitation, is it to be supposed for a moment that they did not recognize the fact that the term "treaties" had a distinct, legitimate, necessary, well-understood meaning? Is it to be supposed that they for one moment contemplated that when the question came up whether a certain measure which involved a negotiation and agreement between this country and another should be accomplished in the way it provided, through a treaty by the President and the Senate, or whether it should be remitted to Congress, that the question of the form of the measure would control?

Is it to be supposed for a moment that they supposed that that which is essentially a treaty, and which they had provided should be made only by the President and the Senate, would be by any species of legislative legerdemain converted into the form of a statute, and another power or department of the Government, which had had distinct powers conferred upon it and which had been denied this power, would usurp it and that its usurpation would be recognized?

Mr. ELKINS. Will the Senator from Georgia allow me to interrupt him?

Mr. BACON. Certainly.

Mr. ELKINS. Does the Senator admit now that Congress can admit a State into the Union?

Mr. BACON. Undoubtedly.

Mr. ELKINS. And it admitted Texas?

Mr. BACON. Yes; but I will say to the Senator that I am coming to the distinct discussion of that branch of the case.

Mr. ELKINS. I merely want to put this question——

Mr. BACON. And I would be very glad if the Senator would pretermit the question until I reach that point, and I shall be very happy at that time to take it up. I am now discussing another line. I am coming to the question of the power to admit States, and that will be the time for the question.

Mr. ELKINS. Having it in mind now, I should like to ask why, if it can admit a State, it can not admit anything less than a State; something that is not a State?

Mr. BACON. I am coming to that, and would be very glad if the Senator would repeat his question if I do not answer it before I get through, because I do the Senator the justice to say that I believe if I can possibly satisfy him of the unconstitutionality of the joint resolution he will not vote for it, however much he may desire the annexation of Hawaii. It is true I am very much dis-

couraged by the fact that the Senator said to me, in private conversation, when I asked him if he was bound by the Constitution, yes, as he interpreted it.

Mr. ELKINS. No; now tell the whole of it. I beg the Senator's pardon. I said as the Supreme Court of the United States interpreted it and as I interpreted it.

Mr. BACON. Very well.

Mr. ELKINS. And not as the Senator interpreted it.

Mr. TELLER. Will the Senator from Georgia allow me?

Mr. BACON. Let me answer the Senator from West Virginia first. If the Senator from West Virginia will stand to that proposition, I will promise to show him a decision of the Supreme Court of the United States which says that the United States Government has no right—I do not go so far as the Supreme Court go in this particular, and I am merely stating this for the benefit of the Senator from West Virginia—to annex territory which it does not intend to make into a State, and Senators themselves say they do not intend to make a State of Hawaii.

Mr. ELKINS. You can not state what will be the intention of the Government a hundred years from now.

Mr. BACON. I am not putting it on that ground at all. Now I yield to the Senator from Colorado.

Mr. TELLER. The position of the Senator from West Virginia is good Democratic doctrine, a doctrine which old Jackson pressed on the country with great force, that every Senator and every Representative could construe the Constitution as he understood it.

Mr. BACON. Of course.

Mr. TELLER. And it was his duty not to look to the Supreme Court of the United States, but to his own judgment and conscience in these matters.

Mr. BACON. I am perfectly satisfied if that shall be the rule. I was discouraged by the fact that the manner of the reply of the Senator from West Virginia indicated that he would not be controlled by what some of the more distinctive lawyer members of the Senate might consider to be the law. He was going to take it into his own hands.

But to return, I am coming to a discussion of the question, to which I ask the attention of Senators, as to what the framers of the Constitution meant when they said "treaties" and what they must necessarily have meant. I asked the question whether it was possible that the framers of the Constitution when they put the word "treaties" into the Constitution in this connection understood that it simply meant an agreement or a negotiation put in a certain form, and that if it were not put in that certain form, it could be refined away and the exercise of the function could be usurped by Congress which had been denied the right to make a treaty. I had asked that question when the Senator from West Virginia interrupted me.

Now, Mr. President, has the word "treaty" a definite, well-fixed meaning? Is a treaty only that which is put in the form of a treaty as we usually see it when submitted to the Senate on the part of the President, or does a treaty mean a certain thing regardless of the form? I say the latter. The distinction between a statute and a treaty does not depend on the form. A statute may be in various forms. It may be in the ordinary form of a statute or in the form of a joint resolution. One has the same effect as the other. A treaty depends for the fact that it is a treaty according to the substance of it and what it proposes to accomplish.

Now, a statute is this: A statute is a rule of conduct laid down by the legislative department, which has its effect upon all of those within the jurisdiction. In other words, a statute passed by the Congress of the United States is obligatory upon every person who is a citizen of the United States or a resident therein. A statute can not go outside the jurisdiction of the United States and be binding upon the subjects of another power. It takes the consent of the subjects of the other power, speaking or giving their consent through their duly authorized government, to be bound by a certain thing which is enacted in this country; and therein comes the necessity for a treaty.

A treaty is that which is binding upon the people of two countries by mutual agreement that it shall be binding upon the two countries. A treaty is binding on two countries because the authority in each country undertakes that it shall be binding in its particular country, and that is the essential element and feature of a treaty, that it is binding on two countries because the authority which makes it binding is the particular authority in each country, not having a general authority over both.

If it were practicable for a statute to be made obligatory upon the citizens of another country, there would be no need of a treaty. We could simply enact what we wanted, and the people in the other country would have to obey. But as we can not do it, we have to invoke the consent of the people or the authority in that other country that they will also be bound by the same law, and that makes a treaty.

Now, Mr. President, I repeat possibly, but I desire to state it in another shape, that the distinction between a treaty and a statute is this: The statute affects only the people within the jurisdiction of the authority by which it is enacted. There is no consent required on the part of those who are subject to such a statute. It is made obligatory upon them by the authority of those who enact it.

A treaty, on the other hand, is something which involves negotiation with another country. It requires the consent of the duly authorized department in this Government, and it also requires that they shall negotiate and obtain the consent of the power in the other Government. This is stated with very great clearness in a report made by the Senate Committee on Foreign Relations in 1844—I have forgotten the number of the Congress—when it had under consideration the Texas resolutions. I will read it. This is a definition of a treaty. I read from Senate Documents, volume 3, 1844 and 1845. It is broken up so that the pages can not be told, as the documents are bound together, but it is Document No. 79, page 5 thereof; not the page of the volume.

But let it be remembered——

And I ask the attention of Senators now to this definition of a treaty—

on the other hand, that although this treaty only acts for other powers and in the singular sphere of exterior concerns, within this sphere no other power has privilege to intrude; the domain is all its own; in a property exclusive. If the affair to be accomplished be exterior and require the intervention of compact to accomplish it, here with the treaty-making power is the office, and sole office, to accomplish it. No other power has privilege to touch.

I do not know whether or not I make my distinction clear, but the framers of the Constitution had in view certain actions by this Government when they set up a distinct and separate department of Government for the making of treaties and when

they conferred upon that department exclusive power to make treaties; and I suggest and urge as the crucial feature in this consideration that the framers of the Constitution necessarily, when they said that the President should have the power to make treaties, with the consent of the Senate, meant to put within that department the power to conduct all negotiations between this country and another country, and to come to any agreement with that other country as to what should be a rule of conduct between them.

If that be true, necessarily everything which is of that nature, everything which can be that and nothing else, must be the subject-matter of a treaty. If not, as I have said before, the framers of the Constitution made a great mistake when they unnecessarily put into the Constitution this machinery by which the power was conferred upon the President of the United States, by and with the advice and consent of the Senate, to make treaties.

Mr. President, I said that it was within the power of Congress to nullify this provision of the Constitution in two ways, either by directly making a treaty with another foreign Government or by putting into the shape of a statute that which in reality is a treaty. Let me illustrate as to the latter, because that is what is attempted to be done here now. The attempt here is to make a treaty by statute. The treaty, as I understand it, which was proposed and negotiated by the President of the United States with the authority of Hawaii, and all the reports in connection with it have been made public, so that I can with propriety speak of them here.

A treaty was negotiated between the President of the United States and the Hawaiian Government. Why did the President of the United States and the Hawaiian Government negotiate a treaty for the annexation of those islands? I hope Senators who are considering this question and who propose to answer it will consider this particular feature of it. Why did the President of the United States negotiate with the Hawaiian Government by means of a treaty for the annexation of those islands except that the President of the United States and the authorities of the Hawaiian Islands recognized that it was the proper subject-matter of a treaty?

Why did the Senate of the United States, when the President submitted the treaty here, undertake to consider it and to give its consent to the treaty which had been negotiated between the President of the United States and the Hawaiian authorities? Why was it that it did not return it to the President and say "This is not the subject-matter of a treaty, and we should not be asked for our advice or consent?" Simply because of the fact that the Senate of the United States, without exception, regardless of what the opinion of any Senator might be on the merits, recognized that it was the proper subject-matter of a treaty.

Aside from this direct recognition it comes within the general definition of that which must be a treaty. It is to accomplish something which can not be accomplished by the unaided act of the United States. It is to accomplish something which requires not only the consent of the United States, but the consent of Hawaii, and therefore must be in its essence and in its character a treaty. And yet, Mr. President, as I have said, in the joint resolution now before the Senate there is an effort made to nullify this provision in the Constitution in the second of the methods

which I suggested, to wit, in the method of putting in the form of a statute that which of necessity can be nothing else but the subject-matter of a treaty.

Mr. WHITE. If the Senator from Georgia will permit me, in line with the point he is making, it may be that the treaty was suggested because of the provision of the Hawaiian constitution, found in the thirty-second article of that instrument, which provides specifically for annexation to the United States by treaty, which treaty, of course, has never been made.

Mr. BACON. I understand that. I have no doubt that point will be fully brought out by the Senators who discuss the merits of the question.

What is it that the House of Representatives has done? And I say the House of Representatives, not in any spirit of criticism of it particularly, because the Senate, through its Foreign Relations Committee, had previously proposed the same thing. Here was the case of a treaty, which was not only recognized by both parties as a treaty and acted upon by both parties as a treaty, but which, in its essence, must of necessity be a treaty, which was practically abandoned in the Senate for the reason that in the manner and the method pointed out by the Constitution it could not be made law. The framers of the Constitution, in their wisdom, had provided that the President of the United States should make a treaty if two-thirds of the Senators present concurred in it.

Now, whether wise or unwise, that is the law. If only a majority concur, the treaty can not be made. Therefore the effect of the failure in the Senate to ratify that treaty was the same as the failure of an attempted passage of a statute law. The friends of annexation, seeing that it was impossible to make this treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House.

I will state the object I have in calling attention to this point. It is perfectly within the power of Congress—and when I speak of Congress in this discussion I mean the lawmaking power—if it has a majority in each House, if it can pursue the method legally which is sought to be pursued here, it is perfectly within the power of Congress not only to nullify and destroy that provision in the Federal Constitution, but to effect by statute any treaty that can not command a two-thirds vote in the Senate.

Mr. TELLER. I should like to ask the Senator if he thinks there is any treaty that we can not annul by a direct act of Congress?

Mr. BACON. I do not. I have so stated already. But I ask the learned Senator——

Mr. TELLER. Then the legislative power can not be inferior to the treaty-making power.

Mr. BACON. The learned Senator has certainly not read the decisions of the Supreme Court on this subject.

Mr. TELLER. I have.

Mr. BACON. The law on the subject is not in doubt. I have stated it already. The Senator probably did not hear it when I first began.

Mr. TELLER. Yes, I did.

Mr. BACON. It was that the Supreme Court have decided

that a treaty and a statute were each supreme, and that when they came in conflict the latter would prevail as being of a later date; in other words, that a statute may be set aside by a treaty, and a treaty may be set aside by a statute.

Mr. TELLER. I ask the Senator if that is not simply a recognition of the statutory right to annul a treaty. We have done that repeatedly. It has been discussed here for days.

Mr. BACON. Nobody disputes that. And in the same way a statute can be annulled by a treaty.

Mr. TELLER. I recall that the Senator from Oregon not now here, Mr. Mitchell, made perhaps a half day's argument on that subject to show by the authorities and by argument the absolute control of the legislative department over any treaty that might be made.

Mr. BACON. The Senator and myself are not differing upon that point. I had announced that before he interrupted me. I say that a treaty may be annulled by a statute, and I say also that a statute may be annulled by a treaty. Now, the point I want to call the Senator's attention to is that while a statute has the power to annul a treaty, and while a treaty has the power to annul a statute, neither one of them has the power to usurp the functions of the other. Let the Senator point out, if he can, any authority for that. In other words, while a treaty made by the President and Senate can be annulled by an act of Congress, that does not imply that the treaty itself can be made by act of Congress. They are two very different things. It can set the treaty aside, but it can not create a treaty.

Mr. TELLER. That is right.

Mr. BACON. That is right, the Senator says, and I am glad that we have gotten now on common ground. It can annul, it can destroy, but it can not create. Now, the point I want to call the attention of the Senator and the attention of the Senate to is, that if the joint resolution under consideration is constitutional, it is within the power of Congress by such a joint resolution to create a treaty.

Mr. TELLER. There is just where the contention comes in.

Mr. BACON. Of course; and I want to try to prove it, if the Senator will permit me.

Mr. TELLER. I say it is no assertion of the treaty-making power, but clearly the legislative power. I want to call the attention of the Senator to another point, if he will allow me. He has spoken of this treaty not having been ratified by the Senate. He must remember very well that when the attempt was made to annex Texas to this country it absolutely failed. The Senate voted the treaty down and declared that they would not have the treaty.

Mr. BACON. I am coming to that. I will read to the Senator all about that before I get through.

Mr. WHITE. Congress did not rely upon a treaty. They did not consider it to be of any effect.

Mr. TELLER. Of course; they voted it down.

Mr. WHITE. You rely upon the treaty here.

Mr. TELLER. We do not.

Mr. BACON. I hope I may have the judicial ear of the Senator, not his controversial ear. I hope I may have the judicial ear of the Senator, because I wish to suggest, so far as I am able, a logical presentation of this matter. The Senator comes to the conclusion

with me that while Congress in its lawmaking capacity may destroy a treaty, it can not make a treaty. The Senator admits that.

Mr. TELLER. I do not want the Senator to understand that he has first put that idea in my mind.

Mr. BACON. Oh, no; by no means.

Mr. TELLER. I have not come to that conclusion from anything in the Senator's argument. That is one of the things that I think every ordinary lawyer in this body would recognize.

Mr. BACON. Well, I am not claiming any very great originality in this matter. I am simply trying to suggest a view of it, and, I hope, with becoming modesty; and I am not assuming to be suggesting anything which the Senator did not know before. I am sorry, I say, that there is this contraversial spirit, because I was in hopes we might have a judicial consideration of this question. If, therefore, not by reason of my argument, but by reason of a fundamental principle which every ordinary lawyer recognizes, it be true that Congress can not by statute make a treaty, then if this procedure is one by which Congress does make a treaty there is no answer to the proposition that it is unconstitutional. I propose to show that by this process Congress does make a treaty; and when Congress assumes to make a treaty, I say it violates the Constitution, and not only so, but it strikes a blow at one of the fundamental and most important prerogatives of the President of the United States and also of the Senate.

Now, why do I say that if this method can be proceeded with successfully it does put within the power of Congress the opportunity to make a treaty? I will have to repeat a little in order to show it, because of the interruptions, to which I do not object. I have called attention to the fact that here was the subject-matter of a treaty. It was a negotiation between this Government and another government. It was something which could not be made effective by the independent action of this Government.

It was something which required the action of this Government and the reciprocal action of another government. And I say, recognizing that to be a necessity, the President of the United States and the Hawaiian authorities had, for the purpose of effecting it, entered into a negotiation and had come to an agreement to make a treaty; that, recognizing it as a proper subject-matter of a treaty, in obedience to the commands of the Constitution of the United States, the President sent the treaty to this body; and that this body, composed as it is nine-tenths of lawyers, and some of them very great lawyers, recognized it as a proper subject-matter of a treaty and considered it for weeks and months as a treaty; whereas if it had not been the subject-matter properly of a treaty they would have refused to consider it; and that because of the fact that they could not command the two-thirds majority required by the Constitution the treaty was abandoned, and the same treaty, word for word, is embodied in a joint resolution passed by the House of Representatives, and it comes here and we are asked that we shall pass it; and that that which would have been law as a treaty if it could have commanded two-thirds majority in this body, shall now become law in the absence of two-thirds by virtue of a majority vote in the House and the Senate, which is only required for a statute, and which is not sufficient for a treaty.

Now, Mr. President, if that is effected, if the joint resolution which has passed the House passes the Senate and receives the approval of the President, what has become law? The treaty?

Yes, the treaty which could not command two-thirds vote here has, if it passes the Senate, become a law. Where is the answer to the proposition that by so doing the Congress of the United States has made a treaty in totidem verbis the same as the treaty which could not get a two-thirds vote in the Senate?

Now, Mr. President, that is not the only illustration. What is sought to be done in this case can be done in any other case. We had before this body during two Congresses, the last Congress and a part of this, a treaty with Great Britain known as the arbitration treaty, from which also the injunction of secrecy has been taken so far as the treaty itself is concerned and the fact that it was rejected by this body.

What prohibited the House of Representatives from taking that treaty and embodying it in a joint resolution, copying it word for word, and sending it to the Senate; and if this joint resolution, by receiving a majority vote of the two Houses, can become a law, what would have prevented the arbitration treaty from becoming a law when it had a majority vote in the House and the Senate, if it had been embodied in a joint resolution and had been approved by the President? Would not that have been making a treaty? Is there any other treaty which can be conceived of which, although it has been rejected by the Senate, still, if it once had the assent of the foreign power, could not be made into law in this country by an act of Congress by copying it into a bill or joint resolution?

Mr. HOAR. Would it disturb the Senator if I should ask him a question?

Mr. BACON. Not in the least.

Mr. HOAR. It seems to me to touch the point of his entire argument. Perhaps he will allow me to follow my question with a single illustration, so that it may be understood. I shall not take sixty seconds in doing so.

Is not the essence of a treaty the incurring an obligation to a foreign nation? Therefore, if we choose to make a bargain with a foreign state that we will annex it in future, that may be done by a treaty concurring in the obligation to a foreign nation. But if we strip it of all that and incur no obligation whatever to any foreign nation, but only pass an act that a certain Territory shall come into the Union, it is only operated upon; it comes in by its consent, as a domestic transaction.

Mr. BACON. The Senator is speaking of the admission of a State?

Mr. HOAR. I will say Territory, which is the same thing. I mean the admission of territory under our control. I do not speak of annexing it to the United States. Let me repeat. I shall not take any time. Is it not the essence of a treaty, the incurring of an obligation to a foreign country? And therefore, although the taking of territory under our dominion, not as a State, might be accomplished by incurring an obligation to a foreign country to do it, if it can be done without that obligation, by a mere legislative act, is not that valid legislation?

Mr. BACON. I say the rule is very much broader than that stated by the Senator. It is not simply the question of incurring an obligation; it is the making of any agreement. It is an agreement by which beyond the jurisdiction of a statute in this country something is made lawful in another country; and whenever it involves the absolute abnegation of authority in the foreign country and the putting it under the authority of this country,

that is certainly a most fundamental and vital agreement between the two.

Mr. President, we could not annex Hawaii by a statute or by a joint resolution if Hawaii had not consented. It would be brutum fulmen unless we proposed to enforce it by war. We can only annex Hawaii by a joint resolution or a statute in case Hawaii has herself assented to it. Therefore it involves a feature of negotiation, and necessarily the feature of agreement. Whenever you have the feature of negotiation and of agreement you have the essential characteristics and qualities of a treaty, and whenever you have a treaty you have that which the Constitution says must be made in a particular way and which can not be made in another way.

Mr. HOAR. Take the case of Texas.

Mr. BACON. I will come to that. If I do not differentiate Texas from this case, I will give up the question.

Mr. PLATT of Connecticut. Will the Senator permit me?

Mr. BACON. Certainly.

Mr. PLATT of Connecticut. The Senator seems to think that there can be no acquisition of territory without a treaty or by war.

Mr. BACON. Yes, or by war.

Mr. PLATT of Connecticut. Suppose that, as on a former occasion, without any previous negotiation whatever, Hawaii had made a cession of her territory and sovereignty to the United States, does the Senator hold that Congress could not accept that?

Mr. BACON. Most undoubtedly; it would require the treaty-making power to do it.

Mr. SPOONER. Will the Senator allow me to ask a question?

Mr. BACON. Certainly.

Mr. SPOONER. Only for information. The first line of the joint resolution reads as follows:

> That said cession——

Mr. BACON. I have the joint resolution in my hand for the purpose of reading that clause, but I am very glad to have the Senator read it.

Mr. SPOONER. Very well.

Mr. BACON. No; go on. I insist that you go on.

Mr. SPOONER. It reads:

> That said cession is accepted, ratified, and confirmed.

Mr. PLATT of Connecticut. I am not discussing this question.

Mr. SPOONER. In other words, has there been any attempted cession——

Mr. PLATT of Connecticut. I am not discussing that.

Mr. SPOONER. I have not finished my questson. Has there been any attempted cession except by treaty? I understand my friend from Georgia is arguing the question whether Congress has the power to accept, ratify, and confirm a cession made by treaty not ratified by the Senate?

Mr. BACON. Yes, sir.

Mr. PLATT of Connecticut. I am not as familiar with what has been done as the Committee on Foreign Relations, but I understand that there has been an offer to cede.

Mr. SPOONER. An offer to cede is not a cession.

Mr. PLATT of Connecticut. One moment. I was not discussing this case particularly, but I was asking a question which, as

it seemed to me, went to the whole argument of the Senator from Georgia, whether if there should have been an actual cession without any previous negotiation on the part of the United States we could not accept that without making a treaty?

Mr. FORAKER. Mr. President——

Mr. BACON. I will answer the Senator from Connecticut, but I yield to the Senator from Ohio.

Mr. FORAKER. I am loath to interrupt the Senator, but I have been desiring for some minutes since he got on this proposition to put a question to him. The question I desire to put is this: Would it not be competent for the Congress of the United States to prescribe by law certain terms and conditions upon which any independent government might come in and become a part of the territory of the United States by complying with the terms and conditions prescribed by the Congress of the United States?

Suppose, for instance, to make plain what I have in my mind, we should provide that any independent people or government, doing what this preamble recites the people of Hawaii have done, should, upon complying with certain conditions, those and others that we might see fit to make, become a part of our territory, they notifying us that they had complied with all the terms and conditions, could we not thereupon declare them to be annexed and make them a part of the territory of the United States, and would not that be a more competent power for the Congress than it would be for the treaty-making power?

Mr. BACON. You can do that if you absolutely nullify the provision of the Constitution which says that a treaty shall be made in another way.

Mr. FORAKER rose.

Mr. BACON. Now, if the Senator will pardon me.

Mr. FORAKER. If the Senator will allow me just one word further, I agree with almost all he has said; but at the point where I differ from him the difference becomes vital. I think that when you make a compact with a foreign power it must be in the nature of a treaty, but that contemplates the continued existence of the foreign power. Therefore, if a foreign power were by agreement to cede to us a part of its territory upon certain terms and conditions agreed upon, it would necessarily have to be done by treaty.

But where the whole foreign country comes in and ceases to be an independent power, as is proposed in this case, it is not properly done by treaty, or at least not so properly by a treaty, I will put it, as by an act of Congress in the nature of legislation. That was the case with Texas. She had ceased to be a part of Mexico; she had acquired her independence; she was an independent Republic: she had a right to stipulate for herself, and she stipulated, among other things, that she would cease to be as an independent power, and therefore she could accept a treaty or she could come in by the door of legislation. While the treaty-making power might be properly invoked, this other power is equally so.

Mr. BACON. Mr. President, I am endeavoring to present with some degree of sequence, if possible, an argument. It is manifestly impossible for me to do so if I am interrupted by Senators, not for the purpose of a question, but for purposes of interjecting arguments. I do not think I can be accused of being unwilling to have interruptions, but I will ask Senators to permit me to pursue the argument with some degree of continuity, and when I have

reached a stopping place at any particular division I shall be more than happy to yield for any question Senators may wish to ask.

Mr. FORAKER. I hope the Senator will not think that I was undertaking to do more than make plain to him what was in my mind.

Mr. BACON. The Senator's interruption was very much less than that of some others.

Mr. FORAKER. I wished the Senator to know while he was on the floor what I had in mind.

Mr. BACON. The Senator from Ohio makes a very important concession, and if he stands by that I think he will be bound to vote against this joint resolution. The Senator from Ohio concedes that if the purpose were to cede to this Government a part of the territory of another government it must necessarily be in the form of a treaty, but that if the purpose is to cede the entire country a treaty is not necessary.

Mr. President, I am utterly unable to see the force of that argument. It is in either case an agreement by which sovereignty existing over certain territory is abandoned, or rather annulled, and by which the sovereignty of this country is given to it. Why should the change of sovereignty as to a part be the subject-matter of negotiation and the change of sovereignty as to the whole be not the subject-matter of negotiation?

Mr. FORAKER. In a word I can answer that. Because there is no continuance of a compact. The whole thing is at an end by its consummation.

Mr. BACON. I do not agree with the Senator, for this reason: The vital essence by which this agreement is made binding is not that anything is enacted in this country which can have force there, but it is because by an agreement in consideration that it shall have force there we say it shall have force here.

But, Mr. President, I was on a practical point, and I want the consideration of Senators to it. The Constitution has clothed us with the high function, in conjunction with the President, of making a certain class of laws, which the Constitution says shall be supreme, to wit, treaties. Now, if this joint resolution can be legally passed, constitutionally passed, I submit the proposition as one which can not be successfully answered, that there is no treaty rejected by the Senate because of a lack of two-thirds vote, if the foreign government had given its assent thereto, as it has done here, or as it did in the arbitration treaty, which could not be made law by the enactment of a statute in the House of Representatives and in the Senate and by it being signed by the President. I see the Senator from Colorado assents to that.

Mr. TELLER. I do not know that I assent to it; but I do not think that the fact that that can be done is any argument.

Mr. BACON. That may be. We shall see whether it is an argument or not. But, Mr. President, I want to say to Senators, if there is any treaty which could be entered into between the President and a foreign government, which, when it failed to receive a two-thirds vote in the Senate, could not be made law by this process, although it could not command a two-thirds vote in the Senate, I want Senators to point it out. If there is any treaty which can be devised which can not command a two-thirds vote in the Senate, which can command a majority in the Senate, which can not be made a law by this process, I want Senators to suggest what that treaty is.

What does that lead us to, Mr. President? If it be true that whenever a treaty fails to get two-thirds majority in the Senate, but can command a majority here and also command a majority in the House of Representatives and command the approval of the President—if it be true that such a treaty, although it can not be enacted or made in the way the Constitution provides, can be made in the way of putting it in the form of a statute or of a joint resolution, do we not, when we give our assent to such a proposition, absolutely surrender the power which the Constitution confers upon us for the making of treaties?

Mr. President, what does that lead to? The Senator from Colorado said he did not know that that would be any argument against the proposition. It leads to this: The President of the United States is the Executive, clothed with the power to make treaties. It can not possibly be denied that it was the contemplation of the Constitution that no treaty should be made which was not initiated by him. Is there any denial of that proposition? If so, let Senators, when they come to speak, answer it. It was the design of the Constitution that every treaty should be made by the President and should be initiated by him, and it was the design of the Constitution and the command of the Constitution that there should be no treaty which did not have his approval; and yet, if this can be done, the House of Representatives can originate a treaty.

The House of Representatives, when England, for instance, has signified her assent by an act of Parliament, or in any other way, can pass a joint resolution saying there shall be such and such an agreement between this country and another country. It can pass the House of Representatives; it can come to the Senate: it can receive a majority of each; and it can go to the President and receive his disapproval. It can go back to the House of Representatives and get two-thirds in that body, and come to this body and get two-thirds in this body, and we have a treaty absolutely over and above the consent of the President.

Do not let Senators confuse this proposition. It can not be said that at last it would rest with the President whether he would proclaim that treaty, because, if this form is adopted, it becomes law, and law binds the President as well as everybody else. Whenever he disapproves it, and it is passed by a two-thirds vote of the House of Representatives and a two-thirds vote of the Senate, it is a law which binds him, and it would be an impeachable offense in him if he refused to carry it out.

On the contrary, in the manner prescribed by the Constitution, he is part of the treaty-making power. A treaty is not obligatory until he himself proclaims it as a treaty. It may be even ratified by the Senate and he can withdraw his approval, for there is nothing that makes it law until he does proclaim it; but when you put it in the form of a joint resolution or a statute it becomes law whenever it has what the Constitution says shall be requisite to make a law, and it is then as binding on him as on anyone else.

So I say there is no escape from the proposition that if that which in its essential character is a treaty can be enacted in the form of a statute or a joint resolution, it is perfectly practicable to have a treaty in its essence and substance which the President of the United States not only has not initiated, not only has not approved, but which he has distinctly disapproved.

Mr. President, I am defending this great prerogative of the

President as well as that of the Senate. His is the principal prerogative, and the prerogative of the Senate is an incident to it. If this precedent can be established, it will return in an evil hour to plague the President as well as the Senate.

Mr. President, this is a very serious consideration; and it is the duty of all of us to maintain every provision in the Constitution. It is doubly the duty of Senators to see that they do not absolutely abdicate the power which the Constitution confers on the Senate; and I can not, for the life of me, see any escape from the argument that, if this method is constitutional, then, wherever the assent of a foreign government can be gotten in another way, practically a treaty can be made without the consent of two-thirds of this body.

Mr. President, I want to read what a great man said on this subject. It is not simply the fact that we abdicate our power; it is not simply the fact that we fail to maintain the authority which the Constitution gives us; it is the fact that if we permit that which is in substance a treaty to be enacted by anything less than two-thirds in this body, we violate a great principle of the Constitution and we violate the rights of the States stipulated for when they entered the Federal Union.

I propose to read what George Washington said about it. The House of Representatives called upon President Washington in 1796 to lay before the House copies of instructions to the ministers of the United States who had negotiated a treaty with Great Britain, and the President, replying to the House of Representatives, asserts the power of the President and of the Senate to the exclusive control of all matters which are treaties, and gives the reasons for it. I read from the first volume of Messages and Papers of the Presidents, by RICHARDSON, page 194:

UNITED STATES, *March 30, 1796.*

To the House of Representatives of the United States:

With the utmost attention I have considered your resolution of the 24th instant, requesting me to lay before your House a copy of the instructions to the minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and other documents relative to that treaty, excepting such of the said papers as any existing negotiation may render improper to be disclosed.

In deliberating upon this subject it was impossible for me to lose sight of the principle which some have avowed in its discussion, or to avoid extending my views to the consequences which must flow from the admission of that principle.

The very principle now under discussion.

I trust that no part of my conduct has ever indicated a disposition to withhold any information which the Constitution has enjoined upon the President as a duty to give or which could be required of him by either House of Congress as a right; and with truth I affirm that it has been, as it will continue to be while I have the honor to preside in the Government, my constant endeavor to harmonize with the other branches thereof so far as the trust delegated to me by the people of the United States and my sense of the obligation it imposes to "preserve, protect, and defend the Constitution" will permit.

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have, as a matter of course, all the papers re-

specting a negotiation with a foreign power would be to establish a dangerous precedent.

It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment, which the resolution has not expressed. I repeat that I have no disposition to withhold any information which the duty of my station will permit or the public good shall require to be disclosed; and, in fact, all the papers affecting the negotiation with Great Britain were laid before the Senate when the treaty itself was communicated for their consideration and advice.

Mr. President, I ask the attention of every Senator to what I am now about to read, because that which is to follow is that which I had in view when I proposed to read this communication to the Senate:

The course which the debate has taken on the resolution of the House leads to some observations on the mode of making treaties under the Constitution of the United States.

Having been a member of the general convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and from the first establishment of the Government to this moment my conduct has exemplified that opinion—that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land.

It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them we have declared and they have believed that, when ratified by the President, with the advice and consent of the Senate, they became obligatory. In this construction of the Constitution, every House of Representatives has heretofore acquiesced, and until the present time not a doubt or suspicion has appeared, to my knowledge, that this construction was not the true one. Nay, they have more than acquiesced; for till now, without controverting the obligation of such treaties, they have made all the requisite provisions for carrying them into effect.

There is also reason to believe that this construction agrees with the opinions entertained by the State conventions when they were deliberating on the Constitution, especially by those who objected to it because there was not required in commercial treaties the consent of two-thirds of the whole number of the members of the Senate, instead of two-thirds of the Senators present, and because in treaties respecting territorial and certain other rights and claims the concurrence of three-fourths of the whole number of the members of both Houses, respectively, was not made necessary.

As stated by him, some States objected to the ratification of the Constitution because when it came to the question of the acquisition of territory the votes of three-fourths both of the Senate and of the House of Representatives were not required. Then he goes on to say:

It is a fact declared by the general convention and universally understood that the Constitution of the United States was the result of a spirit of amity and mutual concession; and it is well known that under this influence the smaller States were admitted to an equal representation in the Senate with the larger States, and that this branch of the Government was invested with great powers, for on the equal participation of those powers the sovereignty and political safety of the smaller States were deemed essentially to depend.

If other proofs than these and the plain letter of the Constitution itself be necessary to ascertain the point under consideration, they may be found in the journals of the general convention, which I have deposited in the office of the Department of State. In those journals it will appear that a proposition was made "that no treaty should be binding on the United States which was not ratified by a law," and that the proposition was explicitly rejected.

In other words, it appears by the journals of the convention which framed the Constitution of the United States that there was a proposition that if the President and the Senate made a treaty it should not be binding until an act of Congress approved it, and that proposition was explicitly rejected. That is what George Washington said about it.

The concluding sentence is as follows:

As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light, and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.

GO. WASHINGTON.

Mr. President, I desire that Senators will mark the peculiar significance of this utterance by Washington. The distinct question which he was having under consideration was whether the House of Representatives had the right to any consideration whatever of the subject-matter of a treaty. They had called on him for information with reference to a treaty, and he had stated to them, practically, "It is none of your business; that is a matter which belongs to the President and to the Senate, and does not belong to the House of Representatives."

I confess that I am utterly unable to understand how anyone can possibly get away from the proposition which I have submitted, which is, that if what is here contended for is legal, whenever a treaty is rejected by the Senate because it can not get a two-thirds vote, and whenever the project can command the assent of a foreign government, a majority of the Senate and a majority of the House of Representatives, with the approval of the President, any treaty thus rejected by two-thirds of the Senate can be enacted into law. If that is so, the provision in the Constitution which gives to the President and two-thirds of the Senate the treaty-making power is not worth the paper or the ink which it has taken to express it; it can be nullified at will.

Mr. President, it is contrary to every rule of construction that such a construction shall be put upon any constitutional provision as will enable it to be utterly nullified and made of no effect. The strongest argument which you can make against any construction of any provision of any constitution or any law is that that construction will nullify it.

A great many people, officials and others, have jumped to a conclusion as to the power of Congress on what occurred in the admission of the State of Texas. There is no doubt that Texas was admitted by a joint resolution, but it is equally undoubted that it was admitted under the express grant of power in the Constitution given to Congress to admit new States, and that the claim that there was no power in Congress to negotiate what in substance would be a treaty was absolutely disavowed by the men who were most prominent in effecting it.

I have here the Congressional Globe, in which there is a discussion in the Senate at the time the resolutions were under consideration for the admission of Texas as a State. I read from the speech of Robert J. Walker, of Mississippi, who was not only a very able man, so recognized throughout the length and breadth of this country, a man of very great learning, of admitted prominence, but one of the most earnest advocates for the passage of the resolutions by which Texas was admitted into the Union. I read from the Congressional Globe, second session Twenty-eighth Congress, page 246:

Mr. Walker said that he was rejoiced that the great American question of the reannexation of Texas was being presented on all hands on the grounds

on which it was placed originally by him (Mr. Walker) in his Texas letter of the 8th of January, 1844.

He (Mr. Walker) then proposed, more than a year since, to admit Texas as a State of the Union by the action of Congress under that clause of the Constitution which authorizes Congress to admit new States into the Union. That clause was not confined to our then existing territory, but was without limitation; and the framers of the Constitution had expressly refused to limit the general power contained in this clause to the territory then embraced within the Union.

The general power, then, was in express words, and no man has a right to interpolate restrictions, and especially restrictions which the framers of the Constitution had rejected. But when this mode of admitting Texas as a State by Congress was suggested by him (Mr. Walker) in January, 1844, he was held up as the author of a new proposition, unwarranted by authority or precedent. Sir, said Mr. W., Mr. Madison, one of the principal founders of the Constitution, had expressly sanctioned this mode of admitting States by Congress out of foreign territory; and one of the most distinguished judges of the Supreme Court of the United States had expressed a similar opinion, all which he (Mr. W.) would show in due time. This opinion was also supported by numerous precedents.

North Carolina, Vermont, Rhode Island, and the Florida parishes of Louisiana were admitted into the Union as States or parts of foreign States by the action of Congress alone. In the case of Rhode Island, she was not represented in the convention which framed the Constitution of the Union, and after the ratification of the Constitution she became the foreign State. She was treated as such by Congress for several years, and duties were imposed upon goods imported from Rhode Island into the Union.

She was treated in every respect as a foreign state, and by the adoption of the Constitution and her withdrawal from the confederacy she became a foreign state and was admitted as such by Congress, being the same question, so far as constitutional power is concerned, whether she had been a foreign state two years or two hundred years, when she was admitted by Congres as a State of the Union.

I read on page 361 of the same volume from Mr. Buchanan:

Mr. Buchanan said he might have assumed the privilege of reply which belonged to him from the position he occupied on the Committee on Foreign Relations, but he waived it. Not because the arguments on the other side had not been exceedingly ingenious and plausible and urged with great ability, but because all the reasoning and ingenuity in the world could not abolish the plain language of the Constitution, which declared that "New States might be admitted by Congress into the Union." But what new States?

The convention had answered that question in letters of light by rejecting the proposed limitation of this grant which would have confined it to States lawfully arising within the United States. The clause was introduced with this limitation, and after full discussion, it ended in the shape it now held, without limitation or restriction of any kind. This was a historical fact.

Mr. President, I could go on and cite innumerable utterances from the Senators and Representatives who were active in that debate to show that while in some instances there were propositions looking to enact what really would have been a treaty between the United States and the Republic of Texas, they were all abandoned, and the advocacy of them was abandoned and the admission of Texas put exclusively on the ground that she was admitted as a State under the provision in the Constitution which specifically authorizes Congress to admit States.

The President and two-thirds of the Senate could not admit a State. A State could not be admitted by treaty. A State can only be admitted by act of Congress, and the Congress of the United States in passing the law which did admit Texas did not annex Texas and did not acquire one single foot of foreign territory. It admitted Texas as a State, and Texas herself reserved every inch of territory within her borders.

This question was again under consideration twenty-five years after that in this Chamber. That discussion occurred in the old Chamber, but in this Chamber twenty-five years ago or more, twenty-eight years ago, when there were as great lawyers in this

body as ever graced it, this very question was again under discussion, when the question of the annexation of Santo Domingo was before the Senate.

There had been a treaty negotiated by the President with the Dominican Government which had been rejected by the Senate, and the President had sent a message to Congress in which, while he did not recommend the annexation of the island, he used language that indicated that such was the design; and upon a resolution which was introduced to send commissioners for the purpose of getting certain information this debate came up, and this question was discussed by the great lawyers then in the Senate as to whether or not by joint resolution foreign territory could be annexed.

In the Senate were such men as Carpenter and Conklin and Thurman and Edmunds and Morton and Garret Davis and Sumner, and every utterance that there was, was either in accordance with the doctrine which I have stated here or else was an utter failure to accept the challenge when it was laid down to them that that was the doctrine.

Mr. President, what was good law in 1844 and 1870 is good law now. What such men as Carpenter and Sumner and Edmunds and Thurman thought to be good law we can not go far astray in recognizing as good law, for I repeat no greater lawyers have ever been members of the Senate of the United States. I do not pretend that each one of the lawyers whose names I have mentioned gave distinct utterance to the proposition I make, but I do say that it was given distinct utterance in the debate, and that in that debate Thurman, Garret Davis, Sumner, Morton, Edmunds, and Trumbull all participated.

Not only were they present but they participated in the debate, and while the doctrine was boldly avowed by some, it was denied by none and taken issue with by none. I read from the Congressional Globe, part 1, third session, Forty-first Congress, page 193, what Judge Thurman said on the subject. If ever there was a man in this Chamber who was recognized by everybody, not only in this body but outside, as a great lawyer that man was Thurman. If ever there was a man who cast a doubt on the question as to his standing in the very front rank of lawyers I never heard him. Here is what he said:

Mr. THURMAN. I believe, sir, it is proper enough for me to say, for I think the President himself says it in his annual message, that a treaty was negotiated for the annexation of Dominica to the United States, and that that treaty failed to receive the requisite votes in favor of its ratification, thus disclosing the fact that between the President of the United States and the Senate there is a direct opposition of opinion upon the subject of this acquisition.

Certainly directly parallel to the case we now have before us.

Now, not willing to defer to the opinion of the Senator—and I do not say that in order to blame him; he has a right to his own opinion—the President, with very great earnestness, urges upon Congress and upon the country the desirableness of this acquisition, and he goes so far as to suggest the mode by which Dominica may be annexed. Seeing that it is not likely to be annexed under the treaty-making power for want of the requisite support in the Senate, he suggests that it may be annexed by joint resolution, as in the case of Texas; and it is with a view to carry out, no doubt, the wishes or opinions of the President in this particular that the Senator from Indiana has introduced the joint resolution.

I repeat that the joint resolution which was introduced was not for annexation, but for the purpose of sending parties there to get information. The discussion, however, proceeded upon the ground that that was the object.

Mr. PASCO. A preliminary step to it.

Mr. BACON. A preliminary step to it, and, therefore, Mr. Thurman comes to the discussion as to whether or not that could be done. If it could not be done, why the preliminary step? He was opposing the preliminary step.

Now, the first thing that strikes me is this: Is the Senate ready to recede from its position? Is the Senate willing to ratify a treaty for the annexation of Dominica, or is the Senate ready to annex Dominica by joint resolution? And in that connection I beg leave to call the attention of the Senate to the fact—

Listen. This is what Thurman, this great lawyer, said:

And in that connection I beg leave to call the attention of the Senate to the fact that you can not by joint resolution annex Dominica as a Territory; you must annex her as a State if you annex her by joint resolution. There is no clause in the Constitution of the United States that provides for the acquisition of territory by joint resolution of Congress unless it be one single provision, and that is that the Congress may admit new States into the Union. And it was upon the argument that there was no limitation upon that power to admit new States into the Union, that it was not limited to territory belonging to the United States, but that territory belonging to a foreign power might be admitted into the Union as a State.

I am now answering the question of the Senator from West Virginia [Mr. ELKINS] by reading to him what Mr. Thurman said.

It was upon that doctrine that the resolution in the case of Texas was passed. But no one has ever pretended—

This is very strong language, because he had reference to the former debate in 1844—

that you could by joint resolution annex territory as a Territory without admitting it as a State. Then, if a treaty is to be abandoned, the proposition which is before the Senate is, is this Senate prepared to annex Dominica in its present condition?

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Nobody, I think, has the least idea that any treaty for its annexation can be ratified. This Senate is not so ignorant that it did not know every essential thing in this resolution when it voted on the treaty. It would be to stultify ourselves to say that there is one single material inquiry in all this resolution that was not known to the Senate when it voted on the treaty; and unless the Senators who were opposed to that treaty are willing to recede from their opposition and ratify a treaty that may be formed, it follows that this resolution can only be put forward with the view of annexing Dominica by joint resolution, and that, as I said before, you can not do unless you are willing to take her in as a State.

That is what Allen G. Thurman said in this Chamber in the year 1870.

I say again that no man on this floor, I think, has the least idea that a treaty of annexation can receive the requisite number of votes for its ratification, and therefore—and I can not, perhaps, repeat it too often—the only question is, Will you annex Dominica as a State?

In the same debate Garrett Davis, of Kentucky, on the same day used language which I will quote. I ask the attention of Senators particularly to this, because Garrett Davis, in the course of his speech, said he was a member of the House at the time the Texas resolution was passed. I read now from the same volume, page 195:

The question so remained, and that was the judgment of the American people until the proposition to annex Texas was presented to the consideration of Congress and the people of the United States. There was a treaty first negotiated by Mr. Calhoun for the acquisition of Texas, and that treaty was laid by President Tyler before the Senate for its action, either of ratification or rejection. The treaty was rejected by the action of the Senate. After that action a joint resolution was introduced to annex Texas as a State of the Union—not as a Territory, but as a State of the Union; and the only power

that was relied upon to authorize Congress to admit Texas was that single provision of the Constitution which authorizes Congress to admit States into this Union. It was my fortune at that time to be a member of the House of Representatives.

Going on, then, to discuss the message of the President, and coming to the point that he really attempted to annex it by joint resolution, Senator Davis used this language, on the same page:

That is the purpose of the President; that is his recommendation; that is his proposition. It is in furtherance of that proposition, as I understand, that this joint resolution has been introduced. It is simply to take up this furtive, unconstitutional project of the President, to be effected without authority of the Constitution, and perverting and usurping its powers by Congress assuming the prerogative of the treaty-making power in admitting into the Union as a Territory territory that now forms part of a foreign country. It is to forward and give impetus, strength, and power to this covert and monstrous proposition that this resolution is introduced.

Are Senators ready to subordinate the power of the Senate to such a purpose, to such a project? Suppose the honorable Senator from Indiana should introduce a joint resolution to-morrow "that the country called Dominica, a part of the island of San Domingo, be, and the same is hereby, annexed to the United States of America as a part of the Territory thereof"—

Just the resolution you have here—

where is the Senator—

Said this Senator, speaking in the presence of such men as those whose names I have called here to-day—

Where is the Senator who would stand up and avow his willingness to support such a proposition?

And nobody answered then or at any other time in that debate. It was denounced, scouted, and yet there was no man in the Senate at that day who would say he favored such a proposition or would defend the right of the House of Representatives and the Senate to pass a law under such circumstances and to such effect.

And yet it is to forward this monstrous proposition, to give it strength and a better chance of success; it is to minister to the pet project of the President that, I understand, this resolution will operate. I do not say that that is the motive with which it is introduced; but I say that will be the effect, and the only effect, of the passage of such a resolution.

Mr. STEWART. From whom does the Senator read?

Mr. BACON. From the speech of Garrett Davis. I had read previously from the speech of Allen G. Thurman. The Senator from Nevada was not present.

Mr. STEWART. I can cite the Senator to others.

Mr. BACON. I have no doubt the Senator would be very much edified by reading them, and if the Senator had pointed them out to me before I began I would have taken pleasure in reading them; but as it is I have trespassed so largely upon the time of the Senate that I hope that will be allowed to pass by.

Mr. STEWART. They are not in line with the Senator's argument.

Mr. BACON. I presume the Senator will read them. He read us a book the other day.

Why should gentlemen who believe that the Constitution does not authorize such a resolution as that—to acquire foreign territory, not to admit it as a State into the Union, but simply to acquire foreign territory—why should gentlemen who maintain the position that Congress has no such power give this resolution the least countenance, when its only object is to effect such a monstrous and unconstitutional project?

I repeat that the debate that day was participated in by Thurman, Davis, Sumner, Morton, Edmunds, and Trumbull, and that

in the face of such enunciation and in the face of such denunciation there was no man in the Senate to rise up and say, "You are wrong: we can do this by joint resolution." On the contrary, they all acquiesced in it.

There is a very significant fact connected with this matter. This, as was stated by Garret Davis, was a pet project of the President of the United States. That President was Ulysses S. Grant, the very idol of the country at that time certainly. In this body were those who were his extreme partisans, and yet while the suggestion that it was his purpose to have a joint resolution passed to annex Dominica was denounced in this body, we do not find one single man who would defend the doctrine that there could be any right by a joint resolution to annex Dominica.

Mr. TELLER. It was denied that there was any such proposition.

Mr. BACON. The Senator from Colorado certainly is not candid in that suggestion. The proposition before the Senate was what was stated by Mr. Thurman to be a preliminary step to that proposition. It was avowed by Mr. Thurman that the resolution before the Senate was a preliminary step to a joint resolution by which Dominica could be annexed to the United States, and he distinctly stated it, and he stated that his opposition to it was that the second step could not legally be taken, that there could be no such thing as annexation of Dominica by joint resolution, and that therefore it would be foolish to take the preliminary step and incur the expense of making an investigation unless it was going to be admitted as a State, which nobody claimed.

Mr. FORAKER. I wish to ask the Senator from Georgia whether or not he deems it conclusive that Senators who were in their seats conceded the correctness of the proposition advanced by Senators on the floor when they did not rise to take issue with them?

Mr. BACON. I will not say a Senator who was in his seat, but I do say that when Senators participated in the debate on that particular proposition, when that was the question involved and upon which and around which the discussion revolved, when Senators did not take issue with it, it was equivalent to saying that they could not successfully do so.

Mr. FORAKER. I simply desire to place on record the negative of that proposition. Every day we sit here and to-day we have sat here and heard propositions advanced which Senators who are in their seats do not agree with and the correctness of which they do not concede. We do not take issue simply because we do not wish to break the continuity of thought, the logical arrangement of the argument which the Senator is presenting to the Senate.

At the proper time we may have something to say in answer to the propositions of the Senator from Georgia. I as one, in view of the position taken, want to say now that while I agree with a great many of the propositions of the Senator from Georgia, I do not at all agree with some of them. I think there is a fallacy underlying his whole argument which disposes of all of it whenever it is presented; and at the proper time it will be presented.

Mr. BACON. If the Senator thinks that, I hope the avowed purpose of those who sympathize with him, not to be heard in this debate, may be changed, and that we may hear from him and other Senators; and I think we will before we get through.

Mr. FORAKER. It is a question of policy in debate whether or not every proposition that is advanced shall be met in argument. Sometimes there are other considerations than the mere meeting of argument that may induce Senators to sit still and allow a Senator to proceed. All I want to register my protest against is, it being taken for granted that because we do sit still and listen to the Senator with pleasure, as we always do, for he is always entertaining, we are on that account to be presumed to be in accord with everything he expresses.

Mr. WHITE. Mr. President——

Mr. BACON. Please pardon me. I am nearly through. I have not taken any such position. I have not said that Senators who were present upon that occasion and who did not participate in the debate were to be taken as acceding to the propositions made, but I have said—this was an isolated proposition—that Senators who participated in the debate and who failed to take issue with it virtually conceded it.

Mr. President, I certainly did not expect to occupy so much of the time of the Senate, and it is fortunate that I said in the beginning that I did not intend to go into a discussion of the merits of the question. I desire to submit to the Senate what I consider to be a very grave question. It is a question, if we pass this joint resolution, not only of one revolution, but of two revolutions. If we pass the joint resolution we enter upon a revolution which shall convert this country from a peaceful country into a warlike country. If we pass the joint resolution, we revolutionize this country from one engaged in its own concerns into one which shall immediately proceed to intermeddle with the concerns of all the world. If we pass this joint resolution we inaugurate a revolution which shall convert this country from one designed for the advancement and the prosperity and the happiness of our citizens into one which shall seek its gratification in dominion and domination and foreign acquisition. Mr. President, if we pass the joint resolution we have entered upon a revolution which shall change the entire character of the Government, which is a government of equals, a government solely for the benefit of its citizens, into a government in which the flag shall float over communities that we would never agree should be equals with us in this Government.

That is a great enough revolution, Mr. President, but if we pass the joint resolution, we have entered upon a revolution which I consider greater and more to be objected to than that: that is a revolution where, because the majority has the power, it will in this body surrender the great function which the Constitution gives to the President of the United States, and also to us as a part of the treaty-making power, and we have entered upon a field where the restraints of the Constitution are no longer to be observed and where the will of the majority shall obtain regardless of constitutional restrictions.

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